No. 10242

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RUFO C. ROMERO,

Appellant,

vs.

P. J. SQUIER, Warden United States Penitentiary, McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant herein filed a petition for a writ of habeas corpus in which petition he alleged: (1) that he was a citizen of the Philippine Islands; (2) that he was unjustly and unlawfully detained and imprisoned by color of authority of the United States, in the cus-

when a certain police warrant issued by the Justice of the Peace of Pasay, Philippine Islands, was used as the basis of search and prosecution.

(2) Appellant was not given a fair and impartial hearing during the preliminary investigation.

(3) That the exclusion from the courtroom of any of appellant's counsel was a violation of his constitutional rights.

(4) That that violation concerning which appellant was charged and convicted was a clear case of entrapment.

(5) That by failure to make the secret maps part of the record, the whole proceedings were void.

Counsel, in this brief, will only mention the points and authorities that seem pertinent to him. For a more thorough analysis of the law and facts involved, reference is hereby made to the exhaustive review of the law and facts occurring during the trial by court-martial, as found in Review of the Staff Judge Advocate (T.R. 55-104), and the oral opinion of the District Judge, Honorable Lloyd L. Black (T.R. 31-52.)

Counsel for appellant relies upon the leading cases of *Johnson v. Zerbst*, 304 U. S. 458, and *Powell v. Alabama*, 287 U. S. 45, cases quoted in all habeas

corpus proceedings, and argues that the special state of facts surrounding this particular case brings it within the doctrine of those cases. There is, however, in this case no similarity between the facts as set forth in the *Zerbst* and *Powell* cases and the one concerning which we are involved.

SEARCH WARRANT AND ENTRAPMENT

In the present case, a search warrant was regularly issued (T. R. 152). It was served by Augustine G. Gabriel, Captain, Philippine Constabularly, residing in Manila, Philippine Islands (T.R. 152). It was obtained by two agents from his office (T.R. 154). On his entry into the house, the officer told the appellant that he had a search warrant with him, and that it was his duty to inform appellant and his wife, and if necessary, to read the contents of the warrant to them. Appellant and his wife both told the officer that there was no necessity to read the same, that they might search the house (T.R. 155).

The search warrant itself was made a part of the Record of the court-martial proceedings.

In those proceedings likewise a stipulation was entered into between the prosecution and appellant,

a copy of said stipulation being found on page 156 of the Bill of Exceptions and on page 6 of appellant's brief.

With a search warrant duly issued, its legality admitted by the defendant, and a search made under it, how can appellant at this time raise an issue, not under appeal, but under a petition for writ of habeas corpus?

Counsel for appellant doesn't contend that the constabulary could not make the search. His objection is that Major Evans was not authorized to be present, that his presence voided the search.

ENTRAPMENT

On the question of entrapment there was a clear question of fact, decided adversely to appellant in the court-martial proceedings.

The solicitation was not initiated by Major Evans nor by Gepte — a secret operative of the Philippine Army. The proposal to Gepte was made by one Agbay — (T.R. 72) who was acting as go-between for one Cabrera. Cabrera and Agbay offered to sell secret maps of the defenses in the Philippine Islands to Gepte. This offer was disclosed to Major Evans. The

latter suspecting that the appellant was the Army officer who was selling secret information to the Japanese, instructed Gepte to accept the offer (T.R. 74).

As a result appellant, Cabrera and Agbay were caught in the act with photographic maps of the defenses of the Philippine Islands in their possession.

There was a conflict in the evidence, to be sure, but that conflict was decided adversely by the court-martial. Its findings are of course binding on this court.

WAIVER

Two serious questions might have been involved in this action, had not appellant waived same.

(1) Was appellant denied the right of civilian counsel?

(2) Was a complete record sent to the Reviewing Board?

Appellant was entitled to civilian counsel, *Title 10 U.S.C.A. Sec. 1488.*

> " * * * The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel

> duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel."

In accordance with this provision Major Howard D. Johnston and Captan James M. Ivy were detailed as Defense Counsel. Appellant retained Benjamin C. De Guzman as Civilian Counsel.

He distinctly stated, however, that he wanted Major Johnston and Captain Ivy to conduct the defense, and De Guzman to act as associate and assistant counsel. (T.R. 110).

Appellant was a graduate of West Point and had been in the Service for practically ten years, as an officer in the United States Army.

Throughout the entire proceedings Major Howard D. Johnston, counsel of his own choice, represented him. Appellant personally was present during the entire proceedings.

Appellant and his military counsel were allowed to examine the secret maps introduced in evidence. Prior to the introduction of the maps, however, appellant was informed that only military officers would be allowed to examine the maps. To this appellant made no objection. (T.R. 128).

During the time that these secret maps were being introduced and examined, civilian counsel was absent from the court room.

He returned immediately afterwards, however. (T.R. 144).

Later with appellants consent, both De Guzman and Captain Ivy withdrew from the case. (T.R. 145).

Appellant was asked by the President of the Court if he requested any other officer besides Major Howard D. Johnston appointed to assist in the defense.

Through his counsel, he stated that he did not. (T.R. 147).

THE RECORD

Appellant likewise consented that the secret maps be not made a part of the record.

> "Trial Judge Advocate: The Prosecution has no further questions, but desires authority to withdraw the maps under discussion from the record because of their secret nature, at the conclusion of this trial.
>
> "Defense Counsel: No objection from the Defense.
>
> "Law Member: Since there is no objection they may be withdrawn." (T.R. 144).

AUTHORITIES

As to entrapment, the law is well settled:

> "Where the doing of a particular act is a crime regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused, and the criminal offense is completed, the fact that an opportunity is furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. * * *"
> Annotation with cases cited — *18 A. L. R. 146.*

In this case, the first solicitation came from Agbay and Cabrera — neither of whom were United States officers. They offered the maps for sale. All Major Evans did was to furnish them the opportunity. There was no solicitation of appellant. Appellant's crime was detected, when he was in the act of furnishing Cabrera, Agbay and Gepte with copies of secret maps, the originals of which had been unlawfully taken by appellant from the Division Headquarters, and photographed.

Search Warrant

The search warrant was legally issued, and was served by officers duly authorized to execute the same. (See stipulation heretofore referred to.) The presence of Major Evans did not void the search by the

proper officials. *Nuckols v. United States*, 99 Fed. (2d) 353.

Presence of Counsel

Accused was a graduate of West Point Military Academy. He was an officer of ten years standing in the United States Army. He consented to his civilian counsel withdrawing from the courtroom when the maps in question were offered. He was at all times represented by Defense Counsel, Major Howard D. Johnston. He now complains that civilian counsel was not present at the investigation. Neither the law nor the Constitution provides for the presence of counsel at an investigation. Even if it did, appellant waived the same, and having waived presence of counsel cannot complain.

Lewis v. Johnston, 112 Fed. (2d) 451,
Franzeen v. Johnston, 111 Fed. (2d) 817.

As to the necessity of the maps being withdrawn from the record, counsel for appellant says:

> The record is secret, why couldn't the same be transmitted to the Reviewing Board.

The answer is found in the statute, *Title 10, U. S. C. A. Sec. 1583*:

> "Every person tried by a general court-martial shall, on demand therefor, made by himself or by

any person in his behalf, be entitled to a copy of the record of the trial."

The Articles of War

The Articles of War are found in *Chapter 36, Title 10 U.S.C.A.* Every requirement of the Articles relating to the investigation prior to the charge, the charge itself and the formation of the court was complied with.

Appellant was an officer in the United States Army. He was subject to trial therefore by general court-martial. *Title 10 U.S.C.A. Secs. 1471 to 1473.*

The court-martial had jurisdiction over the subject-matter. *Title 10 U.S.C.A. Sec. 1483.*

Accused was given the right of challenge. He consented to the personnel of the court. (T.R. 112) The record was duly authenticated. The sentence was approved by the commanding officer. The record was reviewed by the Board of Review, by the Staff Judge Advocate and by the Judge Advocate General prior to being submitted to the President. The President of the United States entered an order by which the sentence was confirmed and directed to be carried into execution. (T.R. 184.)

Appellant's rights were protected at every stage in the trial. The sentence having been duly confirmed, the decision of the court is final.

Carter v. Roberts, 177 U. S. 496 44 L.Ed. 861,
In re Davison, 21 Fed. 618,
In re Zimmerman, 30 Fed. 176.

In *25 Am. Jur., Habeas Corpus, Sec. 28, p. 162*, we find:

> "Habeas corpus is not a corrective remedy, but is concerned only with defects in a proceeding which operate to render a judgment rendered, or process issued, therein absolutely void. It cannot be invoked for use in correcting mere errors or irregularities in the proceedings of a trial court which are not jurisdictional and, at the most, render a judgment merely voidable. The writ of habeas corpus was neither intended to have, nor does it have, the primary function of a proceeding for the review of errors committed by a trial court within its jurisdiction, and consequently, it does not have the force and effect of such a proceeding as an appeal, error proceeding, or writ of certiorari. The proper scope of the remedy of habeas corpus as a means of a collateral attack upon a judgment or process which is absolutely void is not to be distorted by an attempt to make the proceeding available as one in the nature of an appeal or error proceeding, even though, in the particular case, the latter is not available to the petitioner. In other words, a writ of habeas corpus is not a writ of error or a writ in anticipation of error and cannot operate as, be converted into, or serve as a substitute for such writ, even after verdict, to review non-jurisdic-

tional errors and irregularities leading up to the judgment under which the petitioner is restrained, such, for example, as irregularities in disregarding established rules governing trial procedure, irregularities in docket entries, and error in the modification of an erroneous order, notwithstanding they may be flagrant and serious, or even errors and irregularities in the judgment or sentence itself, if they are not defects of a jurisdictional character."

Quoting:

Keizo v. Henry, 211 U. S. 146; re *Moran*, 203 U. S. 96;

McNamara v. Henkel, 226 U. S. 520;

Valentina v. Mercer, 201 U.S. 131;

Charlton v. Kelly, 229 U. S. 447;

Ex parte Parks, 93 U. S. 18.

In *United States v. John Grimley*, 137 U. S. 34 L.Ed. 636, a soldier found guilty by a court-martial for desertion petitioned the court for writ of habeas corpus, the court said, in reversing the lower court:

"* * * It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. * * *"

The above case follows the principle laid down in *Ex parte Reed*, 100 U. S. 13, 25 L.Ed. 538, where a naval officer petitioned for writ of habeas corpus, claiming he had been sentenced after the court-martial was dissolved. The Supreme Court, in upholding the court-martial, stated:

> "The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court.
>
> " * * * * * * * * * *
>
> "A writ of habeas corpus cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 3 Pet., 193; *Ex parte Milligan*, 4 Wall., 2, 18 L.Ed. 281."

Mullan v. United States, 212 U. S. 515;
Carter v. McClaughry, 183 U. S. 365.

In *Ex parte Tucker* (D.C. Mass.) 212 Fed. 569, the Court said, in following the above cited cases:

"Tucker was duly enlisted in the United States navy and was a petty officer therein. Charges of scandalous conduct tending to the destruction of good morals were preferred against him, and by order of the Secretary of the Navy a court-martial was duly convened for the trial of said charges. It is admitted by the petitioner that the court-martial was regularly organized in accordance with law and that it had jurisdiction both of Tucker and of the charges preferred against him. It found Tucker guilty and imposed a sentence of three years in prison, to be followed by dishonorable discharge and forfeiture of pay. The sentence was duty approved by the Secretary of the Navy, who designated the New Hampshire state prison, at Concord, N. H., as the place of confinement. Pending the removal of Tucker in execution of the sentence, this petition was brought.

"The only complaint which the petitioner makes against the court-martial is that, in violation of Chapter 272 of the Acts of Congress of the year 1892, the judge advocate of the court-martial was allowed to be present for a short time during a closed session of the court-martial. This is explicitly forbidden by the act referred to, and the petitioner contends that, by reason of the court-martial's disregard of the statute law, Tucker has not been properly tried, and that the sentence is illegally imposed upon him.

"It is clear that the civil courts are in no sense appellate tribunals for the revision of proceedings in courts-martial. It has been decided that in such cases the civil courts should not interfere if it appears that the court-martial had jurisdiction of the person and of the subject-matter which was tried before it, and that errors in procedure in military courts can be corrected only by the proper military authorities. In re *Grimley, Pet'r,*

137 U.S. 147, 150, 11 Sup. Ct. 54, 34 L.Ed. 636; *Ex parte Reed*, 100 U.S. 13, 23, 25, L.Ed. 538. It is true that Tucker's legal rights were disregarded by the court-martial when it allowed the judge advocate to be present, even for a short time, at the closed session; but I do not think it is the business of this court to correct the error. The statute in question relates to procedure, not to jurisdiction, and the nonobservance of it by military tribunals is a matter for the revising military authorities, not for the civil courts.

"The petition is denied, but without costs."

In *McMicking v. Schields*, 238 U. S. 99, 59 L.Ed. 1220, the Court held the denial of the accused's request for time to answer and to prepare a defense, even if contrary to Army General Order No. 58 in force in the Philippine Islands, did not warrant the petitioner's discharge on the ground that he was thereby deprived of his rights under the Philippine Organic Act due to process of law. The Court, in holding that at most it was an error of law which cannot be revised by habeas corpus, said:

> "Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. * * * "

In *Riddle v. Dyche*, 262 U. S. 333, in habeas corpus proceedings the prisoner claimed that his convic-

tion was illegal because the jury was made of but eleven men. The holding of the Court was that such a matter could be inquired into by appeal, not by habeas corpus.

Likewise, the Supreme Court held, in *Knewel v. Egan*, 268 U.S. 442, that it was not the function of habeas corpus to review the proceedings of a state court criminal case to determine whether or not the information was insufficient as a pleading.

The Articles of War under which the accused was tried appear in *Title 10 U.S.C.A. Secs. 1471 to 1568. Johnson v. Zerbst*, 304 U. S. 458 does not apply in this case because the accused was never lacking counsel. He was represented throughout the whole trial. Under the decision above, the Court will not inquire into the evidence, or how it was obtained, on habeas corpus. But, regardless of that fact, it appears from the record that no objection was pressed to the introduction of the evidence. Furthermore, it appears from the record that the search warrant was valid, based on ample evidence to show a theft under the laws of the Philippines. If competent and material evidence was obtained by means of a valid search warrant, it matters not out of what court such warrant was issued. However, it is respondent's contention that the Court need not consider nor pass upon this point.

What appears to be the last decision on this subject is *Sanford v. Robbins*, C.C.A. 5, 115 Fed. (2d) 435. In that case the Court held that the civil courts cannot review the merits of cases tried in military tribunals and that there can be no release on habeas corpus if the Court had jurisdiction to try the offender for the offense and the sentence was one which the Court could under the law pronounce. This case also states that the mere fact that the defendant may not have had counsel at a court-martial does not necessarily bring such a case within the jurisdiction of *Johnson v. Zerbst.* This case also holds that a court-martial does not lose its jurisdiction to try the accused because it ruled wrongly upon some question of law, even constitutional law.

In the case of *French v. Weeks*, 259 U. S. 335, the court said:

> "Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise."

See also *Creary v. Weeks*, 259 U.S. 336.

CONCLUSION

The military court having jurisdiction over the person of the appellant and subject matter; the defendant at all times being represented by counsel; the conviction and sentence having been duly reviewed in accordance with the statutes of the United States and having been duly and regularly approved and confirmed by the President, the judgment of the lower court should be affirmed.

Respectfully submitted

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